

Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
Application of ComScape Communications, Inc.) File No. 0003023125
and East Kentucky Network, LLC)
For Consent to Assignment of License for)
Broadband PCS Station WPOK570, BTA474,)
Williamson, WV-Pikeville, KY)

ORDER ON RECONSIDERATION

Adopted: June 26, 2009

Released: June 26, 2009

By the Acting Chief, Wireless Telecommunications Bureau:

1. Introduction. In this Order, we address a Petition for Reconsideration1 filed on May 13, 2008, by ComScape Holding, Inc. ("CHI") requesting review of the Wireless Telecommunications Bureau's Mobility Division decision to deny its petition to deny and its approval of the proposed assignment of a wireless license2 from ComScape Communications, Inc. ("CCI") to East Kentucky Network, LLC ("East Kentucky") (collectively, "the Applicants").3 For the reasons discussed herein, we dismiss the Petition for Reconsideration.

2. Background. On May 10, 2007, the Applicants filed the Application seeking consent to the proposed assignment of the license pursuant to section 310(d) of the Communications Act of 1934, as amended.4 The Applicants sought Commission consent to the assignment of WPOK570 - a Broadband PCS C-block license - from CCI to East Kentucky. On May 30, 2007, Jeremiah P. Byrne filed a Petition to Deny objecting to the proposed assignment of license, asserting that Ghanshyam C. Patel, who signed the Application, lacked the authority to assign the license because he allegedly held no office or position of authority in CCI on May 8, 2007, when Mr. Patel signed a Purchase Agreement on behalf of CCI to assign the license from CCI to East Kentucky.5 In an Order, dated April 8, 2008, the Mobility Division

1 Application for Assignment of PCS License from ComScape Communications, Inc. to East Kentucky Network, LLC, Petition for Reconsideration, filed by ComScape Holding, Inc. (May 13, 2008) ("Petition").

2 Broadband Personal Communications Services ("PCS") C-block license WPOK570 in BTA474 - Williamson, West Virginia-Pikeville, Kentucky.

3 Application, File No. 0003023125 (filed May 10, 2007; amended May 29, 2007 and October 4, 2007) ("Application").

4 47 U.S.C. § 310(d).

5 Jeremiah P. Byrne Petition to Deny Application for Assignment of PCS License from ComScape Communications, Inc. to East Kentucky Network, LLC ("Petition to Deny"). Mr. Byrne describes himself as "one of the Disclosable Interest Holders" and "the CCI CEO" as of the date (May 8, 2007) that a Purchase Agreement was entered into between Mr. Patel and East Kentucky for the license in question. Petition to Deny at 1-2.

consented to the proposed assignment of the license, finding the dispute a private matter unrelated to the Commission's duties in determining whether to permit the assignment.⁶

3. On May 13, 2008, CHI⁷ filed the Petition, requesting that the Commission reconsider its grant of the Application⁸ and dismiss the Application or place it in abeyance pending identification of the real party in interest.⁹ Alternatively, CHI asks the Commission to condition its grant of consent to assign the license on the outcome of litigation pending before state courts.¹⁰ In its Petition, CHI broadly asserts that the Application was signed by a person who lacked authority to transfer the license on behalf of CCI.¹¹ Therefore, CHI states that the Commission's consent to the Application unjustly deprived the "real party in interest" of its ownership rights in the license.¹² CHI contends that the Commission may not decline to consider CHI's rights as the party in interest by characterizing this issue as a "private business matter."¹³

4. On May 29, 2008, CCI and East Kentucky filed a Joint Opposition to the Petition, arguing that the Petition was untimely filed and that it lacked a sufficient basis for reconsideration.¹⁴ Substantively, they assert that Ghanshyam C. Patel, who signed the Application for transfer of license, was and remains the sole director, chairman, CEO, and president of CCI as well as of its parent company, CHI.¹⁵ Thus, they argue that Mr. Patel was authorized to sign the Application on behalf of CCI.¹⁶ They further state that Mr. Byrne may not file a petition on behalf of CCI because he is neither an officer nor a director of CCI.¹⁷

5. *Discussion.* We agree with CCI and East Kentucky that the Petition for Reconsideration is procedurally defective. Pursuant to section 1.106(f) of the Commission's rules, a petition for reconsideration must be filed within 30 days of the date of public notice of final Commission action.¹⁸ Section 1.4(b)(2) of the Commission's rules defines the date of public notice of final Commission action

⁶ Application of ComScape Communications, Inc. and East Kentucky Network, LLC, for Consent to Assignment of License for Broadband PCS Station WPOK570, BTA474, Williamson, WV-Pikeville, KY, *Memorandum Opinion and Order*, 23 FCC Rcd 5753 (MD, WTB 2008) ("Order").

⁷ The Petition states that CCI, a wholly-owned subsidiary of CHI, is filing for reconsideration. Petition at 1. However, CHI, which identifies itself as "the real party in interest to the license," is the entity that signed the Petition. *Id.* Jeremiah P. Byrne is an approximately 13% interest holder in CHI. *Id.* at 6, Affidavit of Jeremiah P. Byrne.

⁸ CHI asserts that "final action" of the Commission in assigning the license occurred on April 14, 2008, based on an unspecified notation in the history file of PCS Station WPOK570. *Id.* at 1 & n.1.

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ *Id.* at 2.

¹² *Id.* at 2-4.

¹³ *Id.* at 2.

¹⁴ Joint Opposition to Petition for Reconsideration at 2 (filed May 29, 2008) ("Joint Opposition").

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 1.

¹⁸ 47 C.F.R. § 1.106(f).

as the release date of that notice.¹⁹ Accordingly, the filing deadline for CHI's Petition was May 8, 2008, 30 days following the April 8, 2008 release date of the Order.²⁰ CHI filed its Petition on May 13, 2008 with no reasonable explanation of why it was unable to file within the 30-day period following public release of the Order.²¹

6. Even if we were to ignore the procedural defect and address the Petition on the merits, CHI fails to raise any arguments warranting reconsideration of the Mobility Division's decision. The arguments advanced by CHI relate to a private dispute over the control of CCI; specifically, whether Mr. Patel was authorized to sign and file the subject Application on behalf of CCI. Under section 1.743(a) of the Commission's rules, an officer, director, or duly authorized employee of a corporation is authorized to sign applications to the Commission on behalf of the corporation.²² Generally, corporations are bound by the statements and declarations made by their agents within the scope of their employment and with the actual or apparent authority of the corporation.²³ The issue of whether Mr. Patel's actions were within the scope of his employment is outside the Commission's jurisdiction and is more appropriate for a court of competent jurisdiction.²⁴ Moreover, whether a particular individual had corporate authority to sign an assignment application is a contractual matter, a dispute over which is ordinarily addressed by the courts rather than by the Commission.²⁵ Since this is a disputed issue being litigated in state court proceedings,²⁶

¹⁹ 47 C.F.R. § 1.4(b)(2).

²⁰ On April 10, 2008, the Bureau released an Erratum correcting the document designation on pages 2 through 4 of the Order. Even if we were to consider the date of release of the Erratum as the date of public notice of final Commission action, pursuant to Sections 1.4(b)(2) and 1.4(j) of the Commission's rules, the corresponding 30-day period for filing a petition for reconsideration would have expired on May 12, 2008. See 47 C.F.R. §§ 1.4(b)(2), 1.4(j).

²¹ Although CHI asserts that the history file of WPOK570, in the Bureau's Universal Licensing System ("ULS"), "clearly states that final action of the Commission to assign the license occurred on April 14, 2008," it fails to specify a basis for this theory. Petition at 1 n.1. We agree with CCI and East Kentucky that East Kentucky's reported consummation date of April 14, 2008 as listed in the history file does not constitute the date of public notice of final Commission action. Joint Opposition at 3.

²² 47 C.F.R. § 1.743(a).

²³ See Amendment of Parts 1, 81, 83, 87, 89, 91, 93, 94, and 95 of the Commission's Rules to permit corporate officers or duly authorized employees of corporations to sign applications, amendments, thereto, and related statements of fact required by the Commission, *Memorandum Opinion and Order*, 69 FCC2d 934 n.1 (1978).

²⁴ See Applications of Clarklift of San Jose, Inc. and Moore Material Handling Group, *Order on Reconsideration*, 15 FCC Rcd 4616, 4618 ¶ 6 (WTB PSPWD 2000), *aff'd*, *Order on Further Reconsideration*, 16 FCC Rcd 920 (WTB PSPWD 2001), *aff'd*, *Second Order on Further Reconsideration*, 16 FCC Rcd 14844 (WTB 2001) ("*Clarklift*"). See also Applications of WWC Holding Co., Inc. and RCC Minnesota, Inc. For Consent to Assignment of Licenses, *Memorandum Opinion and Order*, 22 FCC Rcd 6589, 6597 ¶ 16 (WTB 2007) ("*WWC Holdings*"); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Dkt. No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14033-34 ¶ 181 & n. 428 (2005); Application of Margaret Jackson (Transferor) and Ray Webb, *et al.*, For Consent to the Transfer of Control of Sunbelt Television, Inc., Licensees of KHIZ (TV), Barstow, California, *Memorandum Opinion and Order*, 18 FCC Rcd 26403, 26404 ¶ 6 (2003) ("*Sunbelt*"); Applications of Pueblo MSA Limited Partnership Station KNKN519 (MSA #241B), *Order*, 13 FCC Rcd 131, 133 ¶ 5 (WTB CWD 1997) ("*Pueblo*").

²⁵ See S.A. Dawson d/b/a Dawson Associates, Assignment of License for 900 MHz Specialized Mobile Radio Station WNVE296, *Order*, 17 FCC Rcd 472, 474 ¶ 7 (WTB 2002); *cf.* *Listener's Guild, Inc. v. F.C.C.*, 813 F.2d 465, 469 (D.C. Cir. 1987) ("*Listener's Guild*") (noting the Commission's "longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts").

we would decline to overturn the Mobility Division's consent to the Application based on this private matter, as it is not necessary to our evaluation of whether the assignment is in the public interest.²⁷ For these reasons, we would deny the Petition for Reconsideration.

7. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and sections 0.331, 1.102 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.102, 1.106, the Petition for Reconsideration filed by ComScape Holding, Inc. is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

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²⁶ See Order at 2 n.17. Were it undisputed that the transfer application was signed by an unauthorized party, such a situation would be grounds for reinstatement of the license to the original licensee. See, e.g., *Champion Communications Services, Inc., Licensee of Business Radio Service Station KNQ284*, 15 FCC Rcd 12832, 12833 ¶ 4 (WTB PSPWD 2000), *aff'd, Order*, 16 FCC Rcd 207 (WTB PSPWD 2001). However, in the instant case, this issue is disputed. See Petition at 2; Joint Opposition at 4. We note that Mr. Byrne is an approximately 13% interest holder in CHI, which does not constitute *de jure* control, and he has never been put forth as the real party in interest of CCI until this proceeding. Mr. Patel, as an officer of CHI and CCI, has signed applications and notifications before the Commission in the past which have not been challenged. See, e.g., *Administrative Update of ComScape Communications, Inc.* (filed May 29, 2008) (signed by Ghanshyam C. Patel, President); *Administrative Update of ComScape Communications, Inc.* (filed May 29, 2008) (signed by Ghanshyam C. Patel, President); *Application to Cancel Lease of ComScape Communications, Inc.* (filed Apr. 17, 2008) (signed by Ghanshyam C. Patel, President); *Required Notification of ComScape Communications, Inc.* (filed Sept. 29, 2004) (signed by Ghanshyam C. Patel, Chairman and CEO); *Required Notification of ComScape Communications, Inc.* (filed Jul. 13, 2004) (signed by Ghanshyam C. Patel, Chairman and CEO); *Application of ComScape Holding, Inc. For New Wireless Telecommunications Bureau Service Authorization* (filed May 22, 1996) (signed by Ghanshyam C. Patel, Chairman, CEO, and President).

²⁷ 47 U.S.C. § 310(d). With respect to CHI's request that the Commission "condition the grant of consent to assign the license based on the outcome of the State court litigation," it is generally against Commission practice to condition approval of a license transfer on the outcome of state court proceedings. See *Kidd Communications, Letter*, 20 FCC Rcd 13723, 13725 (MB 2005) ("*Kidd*"); *Listener's Guild*, 813 F.2d at 469. However, we stress that our grant of the Application is merely permissive and does not foreclose any relief to which the parties may be entitled based on the outcome of the current or any subsequent litigation or court proceeding. See *Ray Webb, Letter*, 20 FCC Rcd 17997, 17999 (MB 2005); *Kidd*, 20 FCC Rcd at 13725. The Commission reserves the right to reexamine its initial decision in light of judicial findings.